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NO. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

-v.-

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Was the Court of Appeals below correct in declining to attempt to impose at the summary judgment stage of a public figure libel case the heightened burden of proof with "convincing clarity" of a libel defendant's actual malice in the publication of false and defamatory statements?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a nonprofit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation.

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The opinion of the Court of Appeals is reported at 746 F.2d 1563 (D.C.Cir. 1984). The opinion of the District Court is reported at 562 F. Supp. 201 (D.D.C. 1983).

JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1) (1982). Petitioners' petition for a writ of *certiorari* was granted by this Court on June 3, 1985.

STATUTORY PROVISION INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> *Motion and Proceedings Thereon.* The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(c).

STATEMENT OF THE CASE

Respondents set forth below their counter-statement of the case.[1]

The respondent Liberty Lobby is a not-for-profit corporation based in Washington, D.C. It is engaged in the publishing business and publishes *The Spotlight*, a weekly newspaper reporting news and commentary from a non-conforming, populist viewpoint highly critical of current economic and governmental policies. The treasurer of Liberty Lobby is the respondent Willis A. Carto. Because of their activities in the public sphere, the District Court ruled that both Mr. Carto and Liberty Lobby are "limited purpose public figures" for purposes of federal libel law, a finding that respondents did not contest before the Court of Appeals.

This case arose out of the publication of two articles in the October 1981 issue of *The Investigator* magazine (now defunct), whose publisher was the petitioner Jack Anderson. *The Investigator* was owned by the petitioner Investigator Publishing Company, a Texas corporation, whose president and chief executive officer was the petitioner Bill E. Adkins.

The two articles appeared under the heading, "America's Neo-Nazi Underground." One article, whose subject primarily was Mr. Carto and Liberty Lobby, was entitled "The Private World of Willis Carto," authored by Charles Bermant; the other was entitled "Yockey, Profile of an American Hitler," attributed to John C. Obert although also written by Bermant. A single introduction, written by petitioner Jack Anderson,

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1. The issue before this Court for review, although important, is narrow. Regrettably, the Statement of the Case in Petitioners' Brief, and indeed their entire brief, is a continuation of the same theme employed by petitioners at each stage of this litigation—an inflammatory and irrelevant attack on respondents Liberty Lobby and Willis A. Carto, apparently designed to attempt to poison the minds of the Court against respondents, while avoiding and indeed obfuscating the specific issue of the case and the specific facts relevant to this issue.

although signed "The Editors," preceded the two articles.[2] The articles depicted Mr. Carto and Liberty Lobby as neo-Nazi, fascist, anti-Semitic and racist. They contained a plethora of anecdotes purporting to report Mr. Carto's activities, entirely false although portrayed as historical fact, as well as drawings purporting to depict Mr. Carto as a moustached Hitleresque figure spying on his employees through a one-way mirror and making a speech with his arm raised in a Nazi-like salute.[3]

Before the October 1981 *Investigator* was published and distributed, William McGaw, editor of *The Investigator*, reviewed the articles and told petitioner Bill Adkins, president of the company, that the articles were "ridiculous" and "terrible." He conveyed his objection to the publication of the articles to petitioners Adkins and Anderson, to no avail. He also viewed the illustration of Carto portrayed as Hitler and informed the art director that it "could be libelous" and reflected that it be removed from the publication, again to no effect. (J.A. 92 [McGaw Aff. ¶ 19].)

Having received an advance copy of the October 1981 issue of *The Investigator* prior to its distribution, Liberty Lobby and Mr. Carto, through counsel, delivered a letter to petitioner Jack Anderson pointing out in detail the false and libelous statements and demanding that the magazine not be released absent correction of the falsehoods. (J.A. 21 [Complaint ¶ 20].) The petitioners nevertheless proceeded with a nation-wide distribution of the October 1981 *Investigator* without alteration or further examination of the falsehoods of which they had been notified.

Thereafter, on September 15, 1981, respondents Liberty Lobby filed suit in the United States District Court for the District of Columbia, invoking the Court's diversity of citizenship jurisdiction, against petitioners Investigator Publishing

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2. The articles are reproduced at Joint Appendix 24-38.

3. The specific content of the articles is described more fully below.

Company, Anderson, and Atkins,[4] alleging that two of the illustrations and twenty-eight statements contained in the articles were false, defamatory, and published with actual malice on the part of the petitioners. (J.A. 10-23 [Complaint].)

The petitioners moved for summary judgment, claiming that respondents could not show with "convincing clarity" that they had published the offending statements with actual malice, under the standards of *New York Times v. Sullivan,* 376 U.S. 254 (1964), and subsequent cases. In support of their motion, they submitted the affidavit of Charles Bermant, author of the challenged articles, averring his belief that the statements contained therein were true and accurate. Bermant's affidavit contained an appendix listing his sources for the individual statements challenged as libelous in the lawsuit. (J.A. 34-91 [Bermant Aff. and App.].)

During the discovery period, several depositions were taken, including those of Mr. Bermant and petitioner Anderson, and in opposing the motion for summary judgment respondents submitted several affidavits. The Court of Appeals fairly summarized as follows the evidence in the District Court record regarding preparation of the articles bearing on the defamation claims before this Court for review:

> The "Yockey" and "Private World" articles were written by Charles Bermant, although the former appeared under the byline of the magazine's staff writer Jon Obert, because Anderson did not like more than one piece attributed to a single author in any issue. Bermant joined Anderson's staff in March 1981, having previously worked in Anderson's office as an intern, but the story, according to the appellants, began much earlier. In November 1969, Joseph Trento and Joseph Spear published an article in *True* magazine entitled "How Nazi Nut Power Has Invad-

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4. Also named as defendants were William C. McGaw, editor of *The Investigator*, and Jay J. Armes; these defendants were dismissed in the District Court and are not before this Court.

ed Capitol Hill."[3] Carto and Liberty Lobby sued *True*, claiming that the article defamed them. The lawsuit ended with a settlement under which *True* paid Carto a sum of money and published a favorable article about Liberty Lobby. In May 1981, Spear was working for Anderson, now as the Managing Editor[4] of *The Investigator*. He assigned Bermant to investigate the Yockey and Carto stories and, plaintiffs claim, gave him drafts containing the statements made in the *True* article from which to work. Appellants' Brief at 29-30. Although the affidavit that Bermant filed with the district court does not list the Trento and Spear articles as a source, *see* Bermant Affidavit at ¶¶ 8-17, the detailed appendix to the affidavit does identify it as a source, occasionally as the sole source, for some of Bermant's claims. *See, e.g.*, Bermant Affidavit Appendix at 16-17.

Bermant conducted other research, which the district court characterized as "exhaustive" and "thorough." 562 F.Supp. at 206, 209. He reviewed the products of a Freedom of Information Act request, sought information about Carto and Yockey in libraries, and interviewed a number of people. One of his major sources was Robert Eringer, a freelance journalist; several of the allegedly defamatory statements were based solely on Eringer's claims. Bermant never met Eringer and his deposition recounts only one telephone conversation with him. Eringer sent Bermant a draft of an article containing some information about Liberty Lobby. That draft has since been lost, probably "thrown away." Bermant Deposition at 71-72. Eringer never identified any of his sources to Bermant, nor did Bermant inquire. Anderson testified that it did not matter to him whether Eringer was reliable, for "[w]e did not intend to use his material." Anderson Deposition at 51. Eringer, believed at the time of the proceedings below to live in London, was not deposed for this lawsuit. Another of Bermant's major sources was William Cox, an attorney

representing a plaintiff who had sued an organization related to the appellants in the California courts.[3] Bermant interviewed Cox and also relied on the "Declaration of William Cox Regarding the Urgency of the Proceedings," a document apparently produced for the California lawsuit.

Bermant "spent . . . several days" writing first drafts of the articles, which were then edited by Obert. Bermant Affidavit at ¶ 17. There is evidence that several of the allegedly defamatory statements were added to the "Private World" article during the editing process. Bermant Deposition at 119. *The Investigator*'s art department produced several illustrations for the issue—two of which are also subjects of defamation claims.

3. At oral argument, counsel for the appellees conceded that when the *True* article was published, Trento and Spear worked for Jack Anderson. Jan. 20, 1984 Tr. at 33-34.

4. In their briefs, both sides identify Spear as the magazine's managing editor, although he was listed as an associate editor on the masthead of the October 1981 issue. Regardless of title, he was in a position of authority over Bermant, also listed on the masthead as an associate editor.

5. Cox's client, Mermelstein, sued the Institute for Historical Review, an organization associated with Carto. The Institute had offered an award of $50,000 to the first person able to prove that Hitler's mass extermination of Jews had occurred. Mermelstein claimed the prize, and the Institute allegedly refused to pay.

746 F.2d at 1566-67.

The District Court granted the motion for summary judgment, ruling that Bermant's affidavit conclusively established the defendants' lack of actual malice. The District Court did not analyze separately the sources Bermant claimed to have relied upon for each of the individual alleged defamations; instead, the Court based its finding "as a matter of law" of lack of ac-

tual malice on Bermant's account of his review of a host of articles published in a variety of widely circulated newspapers and periodicals. The Court acknowledged the "patent unreliability" of the *True* magazine article as a source, 562 F.Supp. 201, 209, and that the plaintiffs had asserted the recklessness of reliance on other sources, but reasoned that its conclusion of lack of actual malice as a matter of law was unaffected because of "the reality that plaintiffs manage to attack only a small proportion of the sources that defendants relied upon," *id.* at 209.

Liberty Lobby and Carto appealed the District Court's grant of summary judgment to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals rejected the contention of Anderson and the other petitioners that Liberty Lobby and Carto were "libel-proof" and that their claim should thus be rebuffed without further ado. 746 F.2d at 1568-69:

> We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth.

746 F.2d at 1568.

The Court of Appeals affirmed the District Court's dismissal of the challenges to four of the alleged defamations, not because of lack of a showing of actual malice but because the Court of Appeals ruled that the challenged statements were not in fact defamatory in content. *Id.* at 1572. The Court affirmed the dismissal of four additional challenged statements as protected opinion, despite its invective-laden characterization of Carto and Liberty Lobby.[5] *Id.* at 1573.

However, the Court of Appeals faulted the District Court's

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5. The Court of Appeals refused to hold actionable such "opinionated indictments" as 'fascism,' 'Red-baiting,' 'perverted nationalism,' and 'denigration of democracy . . .' *Id.* at 1573.

failure to consider individually the evidence of the defendant's lack of good faith as to the separate allegations of defamations, reasoning:

> Inquiry into the question [good faith reliance on reputable sources], however, cannot be conducted in gross. It is the individual allegedly libelous statement (taken in its proper context) rather than the accuracy of the publication as a whole, which is on trial. A falsehood published with actual malice is no less actionable for being surrounded by an array of well documented and carefully researched allegations. The accompanying truth cannot eliminate the libel, and is indeed the most effective means of increasing its harm by increasing its credibility.

Id. at 1574. The Court examined the evidence in the record regarding the defendants' sources for each of the remaining allegations of defamation and affirmed the dismissal of an additional nine allegations of defamation "which Bermant could show were based on reports previously published in reputable sources," *id.* at 1576, or which Bermant stated were based on interviews with persons in positions which made it reasonable to rely on their assertions. *Id.* at 1575-77.

The Court, however, found that as to nine of the allegations of defamation, a jury could find they were false and made with actual malice, because the sources allegedly relied upon by Bermant were inadequate for the good-faith defense of lack of actual malice. Seven of these nine allegations were anecdotes purporting to describe, as historical fact, Carto's activities and portraying him as ridiculous, reprehensible, or dishonest; two of the alleged defamations were drawings purporting to illustrate the anecdotes and portraying Carto as a moustached, Hitleresque figure spying on his employees and raising his arm in a Nazi-like salute. In analyzing the record, the Court found that the sole sources for these defamations were the *True* magazine article, which had been the subject of a successful defamation action, and the mysterious Robert Eringer, about

whom Bermant and Anderson knew nothing and had no basis to assess his reliability as a source. *Id.* at 1577-79.

In finding that the plaintiffs had demonstrated sufficient basis to show the defendants' actual malice as to these nine alleged defamations, and reversing the District Court's grant of summary judgment as to these allegations, the Court of Appeals declined to impose the "clear and convincing" burden of proof at the summary judgment stage. *Id.* at 1570-71.

Petitioners sought a writ of *certiorari*, which was granted by this Court solely as to the issue of whether the "clear and convincing" burden of proof of actual malice in a public figure libel case should be applied at the summary judgment stage.

SUMMARY OF ARGUMENT

For the purpose of safeguarding freedom of the press guaranteed by the First Amendment, this Court has overlaid the common law of defamation with special substantive rules. Even for damage to reputation resulting from the publication of false and defamatory statements, this Court has ruled that a public figure libel plaintiff may not obtain relief unless he can prove with "convincing clarity" that the defendant published the falsehood with "actual malice," that is, with subjective knowledge that it is false, or with reckless disregard of whether it is true. *New York Times v. Sullivan,* 376 U.S. 254, 280 (1964). The Court has extended the "actual malice" standard of liability to a broad class of libel plaintiffs, not only public officials but also private citizens who, by exercise of First Amendment rights, have involved themselves in particular public issues and controversies and thus attain the status of "limited purpose public figures." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1981).

However, this Court has always recognized the "individual's right to the protection of his own good name," *Gertz v. Robert Welch, Inc.,* 418 U.S. at 341, that underlies the law of defamation and has consistently refused to extend special procedural

protections to libel defendants in addition to the constitutional protections of the substantive law. *Calder v. Jones,* 104 S.Ct. 1482 (1984); *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979); *Herbert v. Lando,* 441 U.S. 153 (1979).

Respondents herein are limited purpose public figures, having for many years spoken out on controversial public issues of the day, and thus are subject to the stringent impediments against maintaining a lawsuit for damage to their reputations as a result of the publication of defamatory falsehoods. The difficulty they face in defending their reputations from defamatory falsehoods is a direct result of their participation in public life, which this Court has consistently ruled is at the heart of the First Amendment's protection. *Dun & Bradstreet v. Greenmoss Builders, Inc.,* 53 U.S.L.W. 4866 (June 25, 1985). The First Amendment interests of news media libel defendants are adequately protected by the existing substantive law; to impose any additional procedural impediments to protection of reputation from defamatory falsehoods would deter private citizens from participation in public life for fear of incurring defenseless attacks on reputation.

The Court of Appeals below correctly applied the existing law of summary judgment, in declining to impose at the summary judgment stage the heightened burden of proof of actual malice with "convincing clarity." Proof of actual malice necessarily involves an evaluation of the libel defendant's subjective state of mind, which depends on the evaluation of demeanor and credibility of witnesses and is thus inappropriate at the summary judgment stage. Moreover, in public figure libel cases, such as the instant case, where the critical issue is the defendant's actual malice in publishing the defamatory falsehoods, it would be inappropriate and unfair for the action to be extinguished without trial solely on the basis of self-serving declarations of the moving party as to his state of mind, untested by cross-examination before the trier of fact.

The Court of Appeals correctly ruled that application of the heightened burden of proof with "convincing clarity"

necessarily involves a weighing of all the evidence, as opposed to the determination of the existence of evidence, and thus is inappropriate at the summary judgment stage. Moreover, establishment of the heightened burden of proof for the existence of actual malice indicates the importance of the correctness of the decision, *Addington v. Texas,* 441 U.S. 418, 423 (1979); such an important decision, involving both an individual's interest in reputation and the First Amendment interests implicated in a libel judgment, should be made on the basis of a complete trial record with opportunity for the court and the trier of fact, through cross-examination, to evaluate the credibility and weight of all the evidence.

The constitutional duty of independent appellate review of the determination of actual malice, *Bose v. Consumers Union,* 104 S.C5. 1949 (1984), is not a substitute for determination by the trier of fact of factual issues but a reviewing function to ensure that the constitutional principles regarding defamation actions are correctly applied. The importance of this constitutional duty of review requires a complete trial record. Moreover, to deny the respondents an opportunity to maintain their case at trial would abrogate the constitutional right to trial by jury.

In this case, the Court of Appeals correctly ruled that the respondents had proferred sufficient evidence regarding the defendants' actual malice in the publication of the falsehoods defaming the respondents.

This evidence included exclusive reliance for many of the false and defamatory statements on an article that had earlier been the subject of a successful action for defamation and upon an informant, about whom the petitioners knew nothing more than his name and about whom they neither knew nor cared to know anything bearing on his reliability as a source. In addition the editor of the magazine himself expressed both opposition to the publication of the story and his belief that the content might well be libelous. Further, the respondents had notified the petitioners before publication of the defamatory article which

specific allegations were untrue and defamatory and demanded that the false allegations be deleted. The petitioners did not respond to the letter and declined to make any inquiry as to the accuracy of the questioned portions of the article. Instead they published it in its original form.

The Court of Appeals correctly ruled that summary judgment should not have been granted and that the evidence of the parties should be presented and tested at trial according to the ordinary procedures of our system of justice.

ARGUMENT

I. THE EFFECTIVE IMMUNITY FROM LIABILITY FOR FALSE AND DEFAMATORY STATEMENTS SOUGHT BY THE DEFENDANTS AND *AMICI* SUPPORTING THEM DOES NOT SERVE THE LEGITIMATE INTERESTS PROTECTED BY THE FIRST AMENDMENT.

A. Legitimate First Amendment Interests are Adequately Protected by Existing Substantive and Procedural Law Regarding Libel Prosecutions.

Since this Court's historic decision in *New York Times v. Sullivan,* 376 U.S. 254 (1964), the common law of defamation has been overlaid with special substantive safeguards to protect First Amendment guarantees of freedom of the press.

Notable among these protections is the immunity from liability for defamation of expressions of constitutionally protected opinion, "however pernicious," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). To give practical effect to the principle that "[u]nder the First Amendment there is no such thing as a false idea," *id.*, the federal courts have fashioned stringent rules to delineate statements of fact, which may potentially be actionable for defamation, from constitutionally protected opinion which "depend[s] for its correction not on the conscience of judges and juries but on the competition of other

ideas," *id.* See, *e.g., Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984) *(en banc), cert. denied,* 53 U.S.L.W. 3836-37 (May 2, 1985, No. 85-1524). Indeed, the Court of Appeals below in the instant case applied these rules in holding that the petitioners' invective-laden characterizations of respondents Carto and Liberty Lobby, which had been challenged as libelous in the district court lawsuit, were constitutionally protected opinion. 746 F.2d at 1572-74.[6]

In the service of further safeguarding First Amendment interests, the Court has erected as an additional rampart an immunity from liability for publication of an untrue and defamatory statement of fact regarding a public official or public figure, unless the public figure plaintiff can prove that the defendant published the falsehood with "actual malice," that is, with subjective knowledge that it is false, or with

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6. Far from the displaying a lack of solicitude toward the interests of media defendants, the Court of Appeals held immune from liability as constitutionally protected opinion statements in petitioners' articles, among others, characterizing accusing petitioners Carto and Liberty Lobby of "inherent or incipient fascism," "virulent anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smokescreen fascist propaganda; superpatriotism and a perverted brand of nationalism; and the creation of a 'survivor mentality' to further fragment society. . . ." 746 F.2d at 1573.

Respondents Carto and Liberty Lobby had vigorously challenged these statements and others as false and libelous in the district court and the Court of Appeals. The implication found in petitioner's Brief at p.7 n.9 that respondents have conceded the truth of these statements is entirely unfounded. That respondents have not challenged the Court of Appeals' finding as to these statements is merely a recognition that under the current state of law such "political rhetoric," 746 F.2d at 1574, "however pernicious," *Gertz, supra,* 418 U.S. at 339, is generally immune from liability as constitutionally protected opinion.

reckless disregard of whether it is true. *New York Times v. Sullivan, supra,* 376 U.S. at 280; *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 351.

The Court has extended the "actual malice" standard of liability to a broad class of libel plaintiffs, not only elected public officials, *New York Times, supra,* but also famous persons prominent in the public eye, *Curtis Publishing Co. v. Butts, supra.* Even more significantly, this Court has ruled that the "actual malice" requirement also applies to a "limited purpose public figure," that is, a private citizen libel plaintiff who, by his public statements and activities, through his exercise of First Amendment rights, has involved himself in a particular public controversy. *Gertz v. Robert Welch, Inc.,* 418 U.S. at 345; see also, *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287 (D.C. Cir.), *cert. denied,* 449 U.S. 898 (1980).

In yet another measure which shields libel defendants from responsibility caused by their damaging words and thus arguably enhances the First Amendment, this Court has established the requirement that a public figure libel plaintiff, to prevail at trial, must not only prove the existence of the defendant's actual malice in publishing the defamatory falsehood; the plaintiff bears a heightened burden of proving actual malice with "convincing clarity," *New York Times v. Sullivan, supra,* 376 U.S. at 285-86, or with "clear and convincing proof," *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 342. Moreover, the trial and appellate court, "as expositors of the Constitution," must conduct an independent review of all the evidence to determine whether the plaintiff has established actual malice with convincing clarity. *Bose Corp. v. Consumers Union of the United States,* 104 S.Ct. 1949, 1965 (1984).

However, while establishing and developing this body of law designed as fortifications against actions by persons defamed and to safeguard First Amendment interests of libel defendants, this Court has consistently rejected invitations to erect procedural barriers to the maintenance of defamation ac-

tions as a "form of double counting" not required for the protection of those interests. *Calder v. Jones,* 104 S.Ct. 1482 (1984). As recently stated on behalf of a unanimous Court,

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. . . . We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e.g., Herbert v. Lando,* 441 U.S. 153 (1979) (no First Amendment privilege bars inquiry into the editorial process). See also *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979) (implying that no special rules apply for summary judgment).

Id., 104 S.Ct. at 1488.

The petitioners have offered no persuasive reason why the substantive law developed by this Court and the lower Courts does not adequately secure First Amendment interests in the context of libel prosecutions, nor any reason to depart from the long-standing principles governing summary judgment noted by this Court in *Hutchinson v. Proxmire, supra,* 443 U.S. at 120 n.9.[7] The spectre raised by *amici* supporting the petitioners of some libel plaintiffs employing baseless lawsuits to harass and silence their critics is a concern for which Rule 11 of the Federal Rules of Civil Procedure provides ample remedy—the award of sanctions, attorney's fees, and costs against a party and/or counsel who engages in baseless litigation or litigation for the

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7. The sophistry of the petitioners' contention that the Court of Appeals departed from ordinary principles governing summary judgment is discussed *infra* at Section II.A.

purpose of harassment.[8] There is no reason to doubt that trial and appellate courts will be especially solicitous, as they should be, where First Amendment considerations are present, to use their authority to impose sanctions for harassing or baseless use of litigation by a party or counsel in a particular case, *cf. Herbert v. Lando, supra,* 441 U.S. at 177-180 (Powell, J., concurring). Accordingly, no First Amendment considerations are present compelling the establishment of an extraordinary procedural barrier of general application to all public figure libel plaintiffs that would have the practical effect of making such cases all but impossible to maintain.

B. A Private Citizen's Advocacy of Views in the Public Sphere is Desirable in our Democracy and Protected

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8. Rule 11 of the Federal Rules of Civil Procedure, as amended Apr. 28, 1983, provides, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of ligitation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

by the First Amendment, but May Well Result in the Citizen's Achieving "Limited Purpose Public Figure" Status for Purposes of Libel Law.

The communications and news media were never intended to be the exclusive beneficiaries of the freedom of speech and expression protected by the First Amendment. In our democratic and pluralistic society, spirited expression and public debate by citizens on matters of public concern is entitled to heightened First Amendment protection, as benefitting not only the individual advocate but our society in general.

This principle was very recently reaffirmed by this Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866 (June 25, 1985). Justice Powell, in announcing the judgment and speaking for a plurality of the Court, recounted the Court's long-standing commitment to the protection of speech on public issues:

> It is speech on " 'matters of public concern' " that is at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] . . . is no mystery":
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> > "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection. *NAACP v. Claiborne Hardware*

> *Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 445, 467 (1980)."

Id., 53 U.S.L.W. at 4867-68.[9]

The respondents Carto and Liberty Lobby have for many years spoken out on the public issues of the day; their views have engendered controversy and criticism. By their exercise of rights this Court has held central to the values protected by the First Amendment, respondents "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and have "invite[d] attention and comment," *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 345. However, the inevitable result of respondents' exercise of First Amendment-protected rights of speech on public issues has been the attaining of limited public figure status, and the concomitant "increased risk of injury from defamatory falsehood concerning them," *id.*

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9. Although members of this Court in recent opinions have articulated differing views on the actual malice standard and its application, nevertheless there appears no division among the Court on the central value of speech on matters of public concern. See, *Connick v. Myers*, 103 S.Ct. 1684, 1697 (1983) (Brennan, J., joined by Marshall, Blackmun, and Stevens, dissenting):

> The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy.
>
> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965). "The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

The price exacted upon respondents as a consequence of vigorous exercise of First Amendment rights on matters of public concern is a heavy one; under the application of the law of defamation since *New York Times v. Sullivan, supra,* it is a price exacted upon any citizen who similarly chooses to speak out on public issues.

C. It is Against Public Policy and the Values Protected by the First Amendment, for Private Citizens Who Become Limited Purpose Public Figures, Through Exercise of First Amendment Rights, To Have No Practical Recourse in Law for Damage to Their Reputations by False and Defamatory Statements and Publications.

Respondents submit that the panoply of protections now indelibly writ as substantive law regarding public figure libel plaintiffs more than adequately safeguards the legitimate First Amendment interests of the news media; to erect any further procedural barriers to the maintenance of a defamation action for a false and defamatory statement would harm First Amendment rights by deterring citizens from speaking out on public issues for fear that they would incur baseless attacks upon reputation for which no effective recourse is available.

Respondents Carto and Liberty Lobby acknowledge that in the marketplace of ideas that is the hallmark of our democracy that the views and positions they express are subject to criticism, attack, and even mischaracterization.[10] However, the scurrilous and false anecdotes contained in the articles published by petitioners, offered as historical fact, stating that Mr. Carto was in effect deriving personal profit from organizational assets, that he emulated Hitler in appearance and action, and that he en-

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10. Respondents have consistently denied the accuracy of the characterization of themselves and their views as "racist," "anti-Semitic," or "fascist," a mischaracterization persisting in the Brief of Petitioners.

gaged in bizarre and secretive conduct in regard to his employees,[11] are defamatory and actionable.

Such scurrilous and false anecdotes of a personal nature are apparently designed to, and have the effect of, holding the respondents open to ridicule and opprobrium, encouraging the public to discount and reject the views respondents expound, and discouraging others from associating with them. The harm to respondents' dignity and reputation is precisely that which this Court has identified as a basic consideration of our constitutional system and entitled to the protection of the law. See *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 341.

The First Amendment is not served by imposing at a preliminary stage of litigation a procedural barrier to libel plaintiffs that in effect makes such actions impossible to maintain.[12] How many citizens will avoid engaging in public life or publicly commenting on issues of concern for fear of opening themselves and their families to attack upon reputation and dignity against which they are powerless to respond?[13]

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11. See opinion of the court below, 746 F.2d at 1577-79.

12. The virtually insurmountable difficulty of meeting a burden at the "clear and convincing" level at the summary judgment stage is discussed *infra,* at Section II.C.

13. As Justice White has earlier noted:

> It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. [citations omitted] Davis Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088 (1942).

II. A PUBLIC FIGURE LIBEL PLAINTIFF, BURDENED WITH THE REQUIREMENT OF ESTABLISHING THE DEFENDANT'S ACTUAL MALICE AS WELL AS THE FALSITY OF THE DEFAMATION, CANNOT BE REQUIRED AT THE PRE-TRIAL SUMMARY JUDGMENT STAGE TO SATISFY THE "CLEAR AND CONVINCING" BURDEN OF PROOF OF ACTUAL MALICE, IN ORDER TO MAINTAIN HIS CASE AT TRIAL.

A. It is Settled Law, as Expounded by This Court and Other Federal Courts, That Summary Judgment May Not be Employed to Extinguish a Plaintiff's Claim Without Trial, Where Issues of State of Mind and Credibility are Present.

The Court of Appeals below declined to impose upon a public figure libel plaintiff, in order to survive the defendant's motion for summary judgment and maintain his case at trial, the requirement not only of demonstrating facts from which a reasonable jury could find actual malice but also from which actual malice could be found at the heightened burden of proof of "convincing clarity." 746 F.2d at 1570. The Court reasoned:

> Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontraverted facts as well.

Id.

The petitioners accuse the Court of Appeals of "unprecedented restructuring of the summary judgment rule," Peti-

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NOTES (*Continued*)

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 400 (White, J., dissenting).

tioners' Brief at 17. However, the Court of Appeals, far from adopting an innovative approach, was merely following settled principles of the law of summary judgment.

1. Where Motive and Intent are at Issue, the Plaintiff is Entitled to Confront and Cross-Examine Witnesses at Trial, so That the Judge May Consider Their Credibility and Demeanor in Finding Facts.

According to the law established by this Court, actual malice of a libel defendant is defined as "the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true," *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 351. The Court has further stated that the test is not an objective one of "whether a reasonably prudent man would have published, or would have investigated before publishing," but whether there is "sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson, supra,* 390 U.S. at 731. In short, the critical issue is the subjective state of mind of the defendant.

This Court has reaffirmed, and the Court of Appeals did no more than apply, the long-standing guideline that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and does not readily lend itself to summary disposition," *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979). This principle has long been the guide where motive or intent is an essential element of the cause of action challenged by a motion for summary judgment, and received its classic expression in the context of anti-trust litigation, where this Court noted:

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only

> when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962).[14]

The point, of course, is not that summary judgment is disfavored when state of mind is at issue; rather, the nature of inquiry into a subjective mental state frequently involves the weighing of credibility by the court and the consideration of varying inferences[15] that may be drawn from the available evidence, an endeavor that by its nature does not lend itself to summary disposition. Thus, the Courts of Appeals, in a wide variety of legal and factual settings, have consistently disapproved the disposition by summary judgment where state of mind is an issue.[16]

Respondents do not quarrel with the general proposition advanced by the petitioners that a party opposing a summary judgment may not defeat the motion merely by speculating that a material issue of fact may emerge at trial. Nor is summary judgment automatically precluded simply because the case is an

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14. The validity of the *Poller* analysis remains unchallenged and was reaffirmed by this Court in *Agosto v. Immigration and Naturalization Service,* 436 U.S. 748, 756-57 (1978).

15. *United States v. Diebold,* 369 U.S. 654, 655 (1962).

16. See, *e.g., Mazaleski v. Treusdell,* 562 F.2d 701 (D.C.-Cir. 1977) (intent to retaliate for exercise of right of free speech); *Cross v. United States,* 336 F.2d 431 (2d Cir. 1964) (credibility of movants' witnesses); *Magill v. Gulf & Western Industries, Inc.,* 736 F.2d 976 (4th Cir. 1984); *Morrison v. Nissan Co., Ltd.,* 601 F.2d 139 (4th Cir. 1979) (existence of intent to fix prices for automobile repairs); *Charbonnages de France v. Smith,* 597 F.2d 406 (4th Cir. 1979) (intent of parties regarding contract formation); *Croley v. Matson Navigation Co.,* 434 F.2d 73 (5th Cir. 1970) (employer's knowledge of dangerous conditions); *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966) (fraud).

anti-trust or other cause of action where state of mind is an element, where no genuine issue of material fact is present.

However, in this case the state of the mind is at issue of petitioner Anderson and Charles Bermant, Anderon's employee and the author of the offending article, as well as the credibility of Anderson's and Bermant's professions of good faith and lack of malice in the publication of the defamatory falsehoods. Far from unadorned speculation, an abundance of circumstances are present from which inferences can be drawn of their actual malice and from which the credibility can be impeached regarding their professions of good faith.[17]

2. The Right to Confront and Cross-Examine Witnesses at Trial is Even More Compelling Where the Moving Party's Own State of Mind (or That of His Agent) are Critical Issues, as in the Instant Case Where the Petitioners Claim Lack of Actual Malice in the Publishing of the False Statements Defaming the Respondents.

The caution against disposition by summary judgment where state of mind or credibility is at issue is particularly compelling where the moving party's own state of mind is the critical element on which consideration of the motion turns. The courts are justifiably reluctant to allow disposition by self-serving declarations without an opportunity for cross-examination

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17. Some of these circumstances include reliance upon an article that had previously been the subject of a defamation action settled to the respondents' satisfaction; reliance upon an unknown source with no care as to the source's reliability; claimed loss of notes bearing upon the preparation of the offending articles; disregard of notice from the magazine's editor that the proposed articles were "ridiculous" and likely libelous; disregard of notice from petitioners that the articles were false and defamatory and distribution without any checking of accuracy of the content. These circumstances are discussed in detail in Section III, *infra*.

before the trier of fact so that the trier of fact may be in a position to adequately judge the demeanor and credibility of the crucial witnesses. Eloquent expression of this principle was made by this Court in disapproving summary judgment upon the affidavits of witnesses allied with or employed by the defendant:

> "* * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408.
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> This Court has said: "The jury were the judges of the credibility of the witnesses * * * and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel by which a jury are to be guided in determining the weight and credibility of his testimony. . . ." *Aetna Life Insurance Co. v. Ward*, 140 U.S. 76, 88.
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> . . . It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner.

Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 628 (1944), *reh. denied*, 322 U.S. 767 (1944).

The authorities offered by petitioner do not in any way, as petitioners suggest, stand for the proposition that genuine issues of defendant's state of mind or the credibility of his assertions do not serve to preclude summary judgment. In *First National*

Bank of Arizona v. Cities Service Co., Inc., 391 U.S. 253 (1968), this Court merely disapproved what had become a *per se* rule against the grant of summary judgment in anti-trust cases, and held that an opposing party may not defeat summary judgment in the absence of "any significant probative evidence tending to support the complaint," *id.*, 391 U.S. at 290. In *Cities Service*, massive uncontradicted documentary evidence supported the defendant's claim of lack of involvement in a conspiracy to restrain trade. Likewise, in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), also relied on by petitioners, the Court of Appeals approved summary judgment because, although an anti-trust case, the defendant's subjective state of mind and intent were not at issue. *Id.*, at 1166.

In this case, however, a myriad of circumstances are present indicating the petitioners' reckless disregard for the truth and casting doubt on their professions of good faith. Petitioners earnestly contend that legitimate explanations exist for each of the circumstances found by the Court of Appeals to constitute evidence of petitioners' actual malice, Petitioners' Brief at 30-40, and that therefore they are entitled to summary judgment.

However, the petitioners' argument goes too far, for ". . . even though there may be no dispute about the basic facts, still summary judgment will be inappropriate if the parties disagree on the inferences which may reasonably be drawn from those undisputed facts." *Morrison v. Nissan Co., Ltd., supra*, 601 F.2d at 139. Indeed, on the facts of this case, many of them disputed, it is appropriate for the trier of fact to evaluate the petitioners' good faith or lack thereof "after observation of the demeanor of the witnesses during direct and cross-examination," *id.*, on such matters as their reliance on the mysterious informant Eringer and whether they were unaware that the *True* magazine article upon which they relied so heavily had been the

subject of a successful defamation action.[18] Where facts and inferences are so sharply in dispute, both respondents' constitutional right to jury trial and the interest in an accurate fact-finding process require resolution of the factual issues at trial.

B. Where the State of Mind and Credibility of the Party Seeking Summary Judgment are at Issue, the Procedures for Assessing the Propriety of Summary Judgment Differ From Those for Assessing the Propriety of a Directed Verdict After Receipt of Testimony at Trial.

The petitioners' claim that "the standard for summary judgment under Rule 56 is identical to that for a directed verdict" under Rule 50. Petitioners' Brief at 13-16. Their argument ignores the essence of the difference between summary judgment and directed verdict, recognized by the Court of Appeals, 746 F.2d at 1571, that the court may assess the weight, as opposed to the existence, of evidence only after trial. Remarkably, petitioners cite as authority the Court's decision in *Sartor v. Arkansas Natural Gas Corp., supra,* in which the Court specifically ruled that summary judgment was improper because issues of credibility were present, although the trial court, after assessing the credibility of the witnesses after cross-examination, might at that point determine whether the weight of the evidence justified a directed verdict.

The Courts of Appeals have consistently followed this distinction in the trial court's role in determining motions for summary judgment and motions for directed verdict, particularly where issues of state of mind and credibility are present. In a

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18. The importance of the opportunity for the trier of fact to observe the demeanor of these critical witnesses upon cross-examination is not supplanted by offering deposition transcripts at the summary judgment stage. See, *Cross v. United States,* 336 F.2d 431, 434 (2d Cir. 1964).

recent case, the United States Court of Appeals for the Fourth Circuit has precisely explained the distinction in this context:

> Summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self-serving direct evidence. *Charbonnages de France v. Smith,* 597 F.2d at 414. . . . Summary judgment also is inappropriate if an issue depends upon the credibility of witnesses, because such credibility can best be determined after the trier of fact observes the witnesses' demeanor. *Morrison v. Nissan Motor Co.,* 601 F.2d 139, 141 (4th Cir. 1979). Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. *Pierce v. Ford Motor Co.,* 190 F.2d at 915.

Magill v. Gulf & Western Industries, 736 F.2d 976, 979 (4th Cir. 1984). Accord, *Panter v. Marshall Field & Co.,* 646 F.2d 271, *282 (7th Cir. 1981), cert. denied,* 454 U.S. 1092[19]; *Morrison v. Nissan Motor Co., Ltd.,* 601 F.2d 139, 147 (4th Cir. 1979)[20];

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19. "Thus to survive summary judgment a party need only *raise* an issue of fact, whereas the test on directed verdict is whether a party has presented sufficient evidence to support a finding in his favor on that contested issue. The directed verdict situation thus presents a higher evidentiary hurdle than the preliminary test of summary judgment."

20. "We might add that, had the district judge made his findings in this case after a trial and after the witness had been subjected to both direct and cross-examination, with an oppor-

Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir. 1973); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970), *reh. denied*, Feb. 26, 1971.[21]

The Court of Appeals thus correctly followed established law in declining to attempt to weigh the evidence in advance of its presentation at trial.

NOTES (*Continued*)

tunity for the judge to observe the demeanor of the witnesses, we would have had no difficulty in concluding that such findings were not clearly erroneous. We conclude solely that, on the record presently made the district court should not have decided the disputed issues in the case by summary judgment."

21. "Knowledge on the part of the company can be proved only by showing the state of mind of its employees. The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue. [citations omitted]

. . . Of course, in holding that the case should go to trial, we do not rule out the possibility of a directed verdict. At the close of the trial, after the parties have presented all their evidence and have been afforded ample opportunity for cross-examination, it may be that there can be only one reasonable inference drawn from the facts. In that case the district court is free to direct a verdict for the proper party."

C. Applying the "Clear and Convincing" Burden of Proof of the Ultimate Issue of Actual Malice at the Summary Judgment Stage Would Impermissibly Deny the Plaintiff the Opportunity to Challenge the Credibility of the Defendant's Self-Serving Assertions of Lack of Malice.

1. The Interest in Avoiding Erroneous Decisions is Not Served by Attempting to Impose the Heightened Burden of Proof at the Summary Judgment Stage.

As part of the constitutional requirements attaching in defamation cases, the element of actual malice in a public figure libel case must be established by the plaintiff at the heightened level of proof with "convincing clarity," *New York Times v. Sullivan, supra,* 376 U.S. at 285-86. The Court, in other contexts, has elucidated the rationale for establishing a constitutionally-based standard of proof:

> The function of the standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship,* 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979) (civil commitment of mentally ill). See also, *Colorado v. New Mexico,* 104 S.Ct. 2433, 2438 (1984).

Establishment of the "clear and convincing" burden of proof for public figure defamation cases obviously allocates to the libel plaintiff a greater risk of erroneous judgment than would be born under the ordinary civil "preponderance of the evidence" standard. The heightened burden of proof also re-

flects the importance of the ultimate decision where First Amendment interests are implicated.

However, the importance of the correctness of the decision in a public figure libel case is in no way an argument that the decision should be made summarily without the benefit of the truth-seeking process of a trial.[22] Indeed, the converse is the case. Moreover, as the Court of Appeals recognized, 746 F.2d at 1570-71, application of the heightened burden of proof at the "clear and convincing" level necessarily implies a weighing of the evidence that is inappropriate at the summary judgment stage.[23]

In applying the criminal burden of proof beyond a reasonable doubt in determining whether the prosecution's evidence is sufficient for the case to go to a jury, the United State Court of Appeals for the Second Circuit has noted that the "test must be applied to the totality of the Government's case and not to each element, since . . . any fact may gain color from others. . . ." *United States v. Taylor,* 464 F.2d 240, 244 (2d Cir. 1972). This principle of determining the sufficiency of evidence at the criminal burden of proof beyond a reasonable doubt, as the Court of Appeals correctly ruled, is fully applicable to the determination of sufficiency of evidence at the heightened

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22. See Section II.A, B, and C, *supra.*

23. The Court of Appeals was correct in rejecting a contrary view apparently expressed in *Yiamouyiannis v. Consumers Union,* 619 F.2d 932, 940 (2d Cir. 1980) and *Nader v. de Toledano,* 408 A.2d 31, 50 (D.C.App. 1979), *cert. denied,* 444 U.S. 1078 (1980), and in noting that in those decisions "those courts' analyses of the facts demonstrate that they rested their decisions upon lack of evidence of malice, not upon lack of 'convincing clarity' in that evidence." 746 F.2d at 1571.

burden of convincing clarity required for public figure libel cases.[24]

Moreover, the importance of the correctness of the decision in public figure libel cases underlays the requirement of independent judicial determination of "whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection," *Bose Corp. v. Consumers Union,* 104 S.Ct. 1949, 1965 (1984). Rather than requiring or even authorizing a summary determination on so important a matter, as the petitioners suggest, this Court in *Bose* specifically affirmed the value of development at trial of evidence of the demeanor of witnesses:

> Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due.

Id., 104 S.Ct. at 1959; accord, *Patton v. Yount,* 104 S.Ct. 2885, 2892 (1984).

This Court has consistently recognized "the individual's

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24. "We believe, in short, that application of the 'clear and convincing evidence' constitutional standard in public figure libel cases is similar to application of the 'beyond a reasonable doubt' constitutional standard in criminal cases. There, 'probable cause' is sufficient to take the case to trial, see *Brown v. Department of Justice,* 715 F.2d 662, 667 (D.C.Cir. 1983), and the heightened standard applies only after the government has had an opportunity to present its full case, *United States v. Davis,* 562 F.2d 681, 683-84 (D.C.Cir. 1977) (on motions for acquittal, court must determine whether there is any evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt)."

746 F.2d at 1570-71.

right to the protection of his own good name," *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 341, and has cautioned that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues," *id.* at 340. Nothing in the case law developed by this Court indicates that such important issues presented by competing interests should be summarily resolved by the self-serving profession of a libel defendant's good faith, untested by cross-examination before the trier of fact in the trial process of our system of justice—the best system yet devised for determination of the truth.

2. Attempting to Apply the Heightened Burden of Proof at the Summary Judgment Stage Would Violate the Right to Trial by Jury Guaranteed by the Seventh Amendment.

Petitioners, with commendable candor, ultimately acknowledge in their brief that they do not seek application of the settled law of summary judgment but instead a "reconsideration" of this Court's statement in *Hutchinson v. Proxmire, supra,* 443 U.S. at 120 n.9 regarding proof of "actual malice" that would be an unprecedented abrogation of the constitutional right to trial by jury. See Petitioners' Brief at 24-26.

This Court has consistently held that evaluation of credibility and of state of mind, that is at the essence of the subjective test of actual malice, are uniquely issues of fact to be resolved by the jury. "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." *Poller v. Columbia Broadcasting System, supra,* 368 U.S. at 473. " 'That part of every case [evaluating weight and credibility of testimony], such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.' " *Aetna Life Insurance*

Co. v. Ward, 140 U.S. 76, 88." *Sartor v. Arkansas Natural Gas Corporation, supra*, 321 U.S. at 628.

This Court in *Bose v. Consumers Union, supra*, was careful to state the constitutional duty of independent review of the determination of actual malice is not a substitute for determination by the trier of fact of factual issues, but a reviewing function to determine that " '. . . the judgment does not constitute a forbidden intrusion on the field of free expression'. [citation omitted]." *Id.*, 104 S.Ct. at 1964. This Court has specifically disavowed the establishment of special procedural rules for libel cases, *Calder v. Jones, supra*, 104 S.Ct. at 1488; nothing in the case law developed by this Court indicates or favors a special abrogation of the constitutional right to jury trial.

Respondents Liberty Lobby and Carto have brought their case in the District of Columbia, the headquarters of their activities as well as that of petitioner Jack Anderson. A jury from this venue should decide the factual issues presented, subject to review according to the principles established by this Court.

III. A COURT SHOULD NOT ATTEMPT TO DETERMINE WHETHER A JURY COULD FIND WITH CONVINCING CLARITY THAT THE CHALLENGED STATEMENTS WERE PUBLISHED WITH ACTUAL MALICE ABSENT DIRECT AND CROSS-EXAMINATION OF THE CENTRAL WITNESSES IN THE PRESENCE OF THE TRIER OF THE FACTS.

The gravamen of the petitioners' brief is, simply put, that the author of the article has come forward since its publication and frankly stated his "belief that each of the challenged passages was true."[25]

This, hold the petitioners, is basically dispositive of the matter at hand. The respondents argue that the author Bermant relied entirely upon classically unreliable sources for a number

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25. Brief for Petitioners, p.27.

of challenged assertions and that the trier of fact who witnessed the demeanor of the author as he attempted to rationalize his pure of heart proclamation might find it to be without apparent credibility. Since cross-examination is the engine which propels our system of justice, in this instance the evidence abounds that the author, Mr. Anderson and Mr. Spear would be hard put to support a declaration of lack of actual malice, so gossamer is the foundation for their most audacious assertions of fact.

The respondents have neither the duty nor the desire to seek to establish the principle that summary judgment is inappropriate relief in all defamation cases. The respondents assert instead that the facts in this case mandate a jury trial and that should, in spite of the almost remarkable factual showing herein, the Court determine otherwise, it would indeed be challenging to conjure up a set of circumstances in which a trial might be required.

A. The Petitioners Relied Exclusively Upon Obviously Unreliable Sources in Publishing a Number of Defamatory and Challenged Assertions.

A libel defendant may be shown to have acted with reckless disregard in publishing defamatory statements based on sources, where he had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra,* 390 U.S. at 731; *Carey v. Hume,* 492 F.2d 631, 637 (D.C. Cir.), *cert. dismissed,* 417 U.S. 938 (1974). Two of the petitioners' principal sources, the Spear/Trento *True* magazine article and one Robert Eringer, were so discredited or unworthy of trust that the petitioners' exclusive reliance upon them for some of the challenged assertions created at the least more than a suspicion of actual malice and might well warrant an inference of actual malice by a reasonable jury. The trier of fact in reaching an appropriate determination would be required to assess the credibility of the petitioners rather than to rely entirely upon their exposition of good faith. A jury is no more required to accept the word of a defendant in a defamation action

as to his state of mind than the government or a jury is required to take the word of a criminal defendant that he lacked the requisite intent for a criminal conviction.

1. The Spear/Trento *True* Magazine Article.

Charles Bermant, the employee of *The Investigator* who authored the articles containing the multiple defamations complained of, relied upon as a principle source an article regarding plaintiffs Liberty Lobby and Willis Carto which appeared in *True* magazine in 1969. It was entitled "How Nazi Nut Power Has Invaded Capitol Hill," and was written by Joseph Spear and Joseph Trento. In March 1970 Willis Carto, a petitioner in this case, filed a libel action against Spear, Trento, and Fawcett Publications, Inc., the publishers of *True*, based on the false and defamatory assertions contained in the article. (J.A. 100 [Carto Aff. ¶ 7].) The lawsuit was settled in 1970, with a payment by the defendants to Carto of a sum of money and the publication in *True* of a compensatory article correcting the previously published defamations. *Id.* at 2.[26]

A decade later, Spear, then Managing Editor of *The Investigator*, a petitioner in this case, assigned Bermant, a newly hired employee, to write essentially the same story regarding

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26. The petitioners assert that the article was not compensatory and that "in no sense can be regarded as a retraction of anything in the prior article" Brief p.39 footnote 32. The powerful Nazi Nut who invaded Capitol Hill was assertedly Willis Carto according to Joseph Spear and Joseph Trento. The subsequent article was entitled "*True* Talks to the People's Lobby" and began with the endorsement by Colonel Curtis B. Dall, the son-in-law of President Franklin Delano Roosevelt, that "Liberty Lobby was envisioned around 1955 by Willis A. Carto, a great American patriot." The second article was as extravagant as the first but saw the matter from an entirely different and contradictory perspective. From a Nazi Nut the respondent was transformed into a visionary and great American patriot. Perhaps in some sense it might be regarded as a retraction.

Liberty Lobby and Carto, and gave him two drafts containing statements similar to those previously published in *True*. Bermant then used the earlier Spear/Trento *True* article as his most important source, and relied upon allegations it contained more often than he relied upon all other sources combined.[27]

Bermant, working under Spear's supervision, relied upon *True*, testified that he was not told that *True* had in essence published a retraction, was not informed that Spear and *True* had been sued for libel, and was not told that *True* had paid to Carto a sum of money in settlement of the law suit for defamation.

While it might strain credulity to accept the Bermant deposition testimony that he did not know that the article he relied upon more heavily than all other published articles combined, which was written by his supervisor, was the subject of a successful defamation action, there is no direct evidence to contradict his assertion. The evidence would surely permit a reasonable jury to consider the inference that the defendants used Bermant to, in effect, "launder" sources known to them to be unreliable and that they did so without disclosing to Bermant the single most important fact about the *True* article—it was the basis of an earlier libel suit in which the defendants felt constrained to pay for the libel they had published and to publish in response an article about the plaintiffs written to the specifications of the plaintiffs as compensation for the defamation.

The presence in the record of the evidence regarding the *True* article as a source for the defendants' publishing of defamatory statements alone warrants a jury trial. The petitioners assert that "[N]o reasonable inference can be drawn that Spear had notice of the *True* litigation" (p.38 footnote 31). The Court of Appeals concluded that the fact that the *True* article "was the subject of a prior defamation action which was settled

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27. An evaluation of the appendix to his affidavit submitted by Bermant reveals that he relied upon 38 assertions in *True*.

to Carto's satisfaction [was] a fact likely known to Bermant's editors, if not Bermant."

Indeed it seems quite unlikely that the managing editor (Spear) of a publication entitled *The Investigator* was so poor a journalist and "investigator" that he did not know the consequences suffered by *True*, his employer for having published his defamatory article.

The Court of Appeals found that "a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice." (746 F.2d at 1578.) Clearly the respondent is entitled to submit this claim so that the trier of fact may assess the striking allegations of Bermant and Spear as to their innocent ignorance.

In this regard the Court of Appeals held:

> Whether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carto joined the singing of "Hitler's 'Horst Wessel Lied' " and delivered a speech in an attempt to emulate Hitler's style and charisma, were based solely on the *True* article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

(746 F.2d at 1578).

2. Robert Eringer.

One of the more curious and egregious libels in the articles in *The Investigator*, complained of at paragraph XVII of the Complaint, is the assertion that "Carto often observes interviews of prospective employees through a mirror," accompanied by a drawing of a Hitleresque person, allegedly Carto,

spying by looking through a one-way mirror.[28] (J.A. 10 [Complaint, ¶ XVII, XIX].)

Bermant, in the appendix to his affidavit in support of the motion for summary judgment, at pages 15 and 16, listed one Robert Eringer as the sole source for the false statement and drawing, as well as the sole source for a number of other libelous statements complained of.

In his deposition, Bermant, in describing the extent of his contacts with Eringer and his knowledge of Eringer as a source, stated that before publication of the article he had never met Eringer, who he believed resided in London. Bermant deposition, p. 70. He related that Eringer in a telephone call had offered to send a draft article regarding Liberty Lobby and had done so. Bermant stated, however, that the draft Eringer sent had been lost, probably "thrown away." Above all, Bermant admitted that Eringer never gave him any indication as to his sources for the now discarded draft which nevertheless became a principal source for Bermant. When he was deposed Bermant was asked if he recalled any particular information given to him by Eringer which he used in the article. Bermant replied "there was quite a bit."[29]

Anderson also testified about the mysterious Mr. Eringer. He seemed to know even less about him although Eringer was the exclusive source for five challenged assertions.

At his deposition Anderson testified as follows:

> Q. Who is Robert Eringer?
>
> A. I don't know. He has been a freelance writer, I presume.
>
> Q. Had you ever had any other contact with him?
>
> A. The only reason I remember anything at all is because you say that we paid him. If we paid him, then he

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28. In his affidavit of October 9, 1982, plaintiff Carto attests that, "I have never made use of a one-way mirror for any purpose." (J.A. 101 [Carto Aff. ¶ 6].)

29. (J.A. 262 [Bermant Dep. Tr.].)

would have been a freelance writer. There would have been no other reason to pay him.

It does stir my memory a little. It seems to me we did pay a freelance writer who made the original proposal.

Q. But to get back to my question to be sure I heard the answer, did you ever have any previous contact with Mr. Eringer?

A. I don't even know him.

Q. So you can contribute nothing more about Mr. Eringer other —

A. Nothing whatsoever. I may have talked to him during this period. I probably would have authorized the payment which you say I made.

I have a vague recollection that some freelancer did propose this article and I paid him for his idea, and the research that he had done.

Q. Did you have any reason to believe that this individual was reliable?

A. It wouldn't have mattered. The decision was to go ahead with his idea. We did not intend to use his material.

Q. Do you recall whether his idea would have involved the articles which have appeared in the Magazine about both Mr. Yockey and Mr. Carto or would his idea have referred to only Mr. Carto?

A. I have no idea.

As I say, I didn't even remember it until now. My memory continues to be quite vague of it.[30]

Surely for a trier of fact Anderson's testimony as well as his demeanor, which appears even from a reading of the printed page to manifest at the least a studied indifference and perhaps even a reckless disregard for the truth as well as perhaps arrogant disdain for judicial accountability for his false utterances, would have been illuminating.

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30. (J.A. 185 [Anderson Dep. Tr.].)

The contrast between Anderson's testimony and Bermant's testimony regarding exclusive reliance upon Eringer as a source might well, when assessed by a trier of the fact, influence the resolution as to the credibility of either or both of these central witnesses.

To this the petitioners respond:

> Two additional concerns raised by the Court of Appeals deserve only brief mention. Although the court stated that "Anderson admits that he did not care whether Eringer was reliable." 746 F.2d at 1579, this statement distorts Anderson's testimony[27] and improperly relies on his supposed "admission."
>
> 27. Anderson never testified that he didn't care whether Eringer was reliable. His testimony was that his own belief about Eringer's reliability "wouldn't have mattered," since he was relying on *Bermant's* work and not that of Eringer or any other individual source. (J.A. 185, 194 [Anderson Dep. Tr. 51, 67].)

The Court of Appeals did not "distort" Anderson's testimony. Anderson testified that Eringer's reliability "wouldn't have mattered" explaining not that he was relying upon Bermant's work but rather that *The Investigator* did not intend to use Eringer's material.

The Court of Appeals, in finding that those allegations which were apparently based exclusively upon Eringer's assertions should have been presented to the jury, held:

> Moreover, Bermant's dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came

close to the hypothetical case of actual malice the Supreme Court described in *St. Amant*: a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

746 F.2d at 1578-79.

While the telephone call was in this instance not truly anonymous[31] as was the apocryphal telephone call described by the Court in *St. Amant* five allegations were based "wholly" upon it and all were "unverified." Thus life again imitated art and Anderson, fictional hypothesis.

B. The Petitioners Published the Defamatory Article and Drawings Despite Having Received Specific Notice That They Were Libelous and Despite the Beliefs Held by the Editor of *The Investigator* That They Might be Libelous.

On August 28, 1981, before the October 1981 issue of *The Investigator* had been released to the public, the plaintiffs delivered to the publisher of *The Investigator*, Jack Anderson, a formal notification that the above-described defamatory matter was libelous, pointing out in detail the false statements contained in the proposed publication, and demanding that the October 1981 issue of *The Investigator* not be released to the public while it included the defamatory matter concerning the plaintiffs. The plaintiffs received no reply to their notification, and the defendants subsequently released the October 1981 issue of *The Investigator*, containing the above-described defamatory matter concerning plaintiffs, to the public.

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31. Bermant testified that Eringer did use a different name for a different story and the record is barren as to which name, if either, is the correct one (J.A. 262 [Bermant Dep. Tr.].)

(J.A. 10 [Complaint ¶ 20].)

In paragraph numbered XIX of the complaint the plaintiffs claimed as false and defamatory, the:

> Illustration depicting man bearing a strong resemblance to Adolf Hitler, with Hitlerian moustache and right hand raised in the unmistakeable suggestion of a Nazi salute, caption "Carto, whose speeches were once a staple of ultra-right gatherings, no longer speaks in public."

The only source offered by Bermant for the statement and drawing is the *True* magazine article discussed above. William McGaw, the editor of *The Investigator*, in his affidavit submitted by plaintiffs in opposition to summary judgment, revealed that when he first saw the drawing in question,

> I called up *The Investigator* art director, Bernie Springsteel, who was in New York, and said, "Bernie, that's giving the wrong impression. You'd think this was Hitler. You've got Hitleresque features and you've got the name Carto underneath." I told the art director, "That could be libelous. You'd better get that off there."

(J.A. 92 [McGaw Aff. ¶ 17].)

In this instance the defendants were given actual notice by their own editor prior to publication of the possible libelous nature of this statement and drawing, and yet proceeded to publication deliberately disregarding the warning they had received.

Indeed, McGaw stated in his affidavit that he had told defendant Anderson that the articles were "ridiculous" and "terrible," (J.S. 92 [McGaw Aff. ¶ 11]), as well as possibly libelous, and that he objected to their publication (J.A. 92 [McGaw Aff. ¶ 19]). McGaw related that Anderson told him that they were proceeding nevertheless to publish the articles, stating as the reason:

> You know when I addressed a meeting of magazine distributors in New York, I noticed they were virtually all

> Jewish. And really the reason I am running these articles about Yockey and Carto is so that they'll be favorable toward us and give us a prominent display on newsstands and supermarkets.

(J.A. 92 [McGaw Aff. ¶ 15].)

Publication of the libelous statement in this article, after having received specific notification from the editor of the libelous character, surely constitutes evidence of subjective awareness of probable falsity, requiring that the case go to a jury for resolution.

C. Had the Court Adapted the "Clear and Convincing" Standard of Proof Sought by the Petitioners at the Summary Judgment Stage the Case Should Have Nevertheless Been Submitted to Jury Trial.

The assertion by the petitioners that no reasonable jury could, by applying any standard, find for the respondents, after the Court of Appeals had unanimously found the converse to be true reflects less upon the evidence than upon the perception and judgment of the petitioners. Indeed even the allegations which the petitioner has submitted to this Court (improperly adding here to the record[32] while improperly subtracting there

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32. In footnote 31 of the Petitioners' Brief which appears on page 38 the petitioners make several assertions regarding Joseph Spear which are nowhere to be found in the record of this case and which were not submitted to the Court of Appeals. The allegations contained in the footnote do not appear in the Joint Appendix and are about matters which allegedly occurred even before the article, which is the subject matter of this law suit, was published. Reference to these events and the filing of a supporting document with the Office of the Clerk of this Court is an attempt to place before this Court matters which were not before the Court of Appeals.

from the record") constitute the basis for jury consideration.

Although the Court of Appeals discussed in detail the impropriety of using the clear and convincing standard in deciding a motion for summary judgment, it did not hold that none of the respondents' evidence met the standard. Indeed, the District Court, in its Opinion, referred only to the petitioners' allegations of racism and anti-Semitism, and never even mentioned any of the nine allegations which the Court of Appeals said that a jury could reasonably conclude were defamatory, false, and made with actual malice. (Appendix to Petition, 66-a, 746 F.2d 1563.) The Opinion of the Court of Appeals can as well as not be interpreted to mean that the nine allegations left standing rose to the level of clear and convincing proof.

The following factual allegations were listed by the Court of Appeals as those a jury could reasonably find false, defamatory, and made with actual malice:

(1) Willis Carto, Liberty Lobby's founder/treasurer, owns the Government Educational Foundation (GEF), which owns the building originally bought with money contributed by Liberty Lobby's members and which now charges Liberty Lobby $6,000 a month rent for the building.

This allegation charges Liberty Lobby's founder and treasurer with fraud and with making personal profit by means of a company supposedly owned by him charging Liberty Lobby exorbitant rent. Bermant relied solely on the discredited source, Eringer, for this falsehood, except for the bare statement that GEF is Liberty Lobby's landlord.

The petitioners' claim tnat this and the other false state-

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33. Although the petitioners concede that a subsequent article was published by *True* (footnote 32, page 39, Petitioners' Brief) they deny that it was a retraction. This matter is discussed in this brief at Section II, *infra*. The petitioners, however, fail to state that the record in this case reveals that the defamation action was settled was settled to Carto's satisfaction and that a sum of money was paid to Carto and Liberty Lobby by *True* (J.A. 101 [Carto Aff. ¶ 8]).

ments listed in this section are "details in these articles that lent further color" to the overall picture of racism, anti-Semitism, and the like (Petitioner's Brief, p.29), is not supported by the evidence. The "details" are not details, but instead are approximately equal in importance and defamatory impact with the other allegations. The "details" neither "lend further color" to, nor "illustrate" the "larger picture" (Brief for Petitioners, p.30); the various defamatory statements deal with unrelated subjects, stand on their own and neither support nor illustrate the other allegations.

(2) Willis Carto organized and promoted a group whose aim was the forced deportation of all blacks to Africa.

There was no support for this false statement in any of Bermant's sources. On the contrary, a source known to respondents spoke of voluntary repatriation, not forced deportation. A jury could scarcely avoid the conclusion that the respondents wilfully and maliciously chose the word "deportation" and entirely from their own imagination added the word "forced" in order to damage respondents.

(3) Illustration of Willis Carto as Adolf Hitler (caption). A drawing of Willis Carto with Hitlerian features and moustache, arm raised in suggestion of a Nazi salute. None of respondents' sources ever stated or implied that Carto looked like Hitler, wore a moustache, or used the Nazi salute. The illustration is a malicious invention. The editor of the respondents' magazine, *The Investigator,* William McGaw, stated prior to the article's publication, ". . . that's giving the wrong impression. You'd think this was Hitler. You've got Hitleresque features and the name Carto underneath. This could be libelous. You'd better get that off there." (Joint Appendix, 95.)

It is difficult, given these circumstances, to conclude that the petitioners did not entertain doubts as to the defamatory character of their assertions. The willingness to proceed with the drawing, like the thirteenth stroke of a clock, casts discredit as well upon all that had gone before and all that was to follow.

(4) Willis Carto joined in singing "Hitler's 'Horst Wessel

Lied' " and delivered a speech in an attempt to emulate Hitler's style and charisma.

The original and uncorroborated source of this false statement is the discredited *True* magazine article. The Court of Appeals was correct in holding that a jury should determine the falsity of the statement and the respondents' awareness of its falsity.

(5) Willis Carto conducts his business by way of conference calls from a public telephone.

This statement falsely suggests that Carto conducts all of his business from public telephones in order to conceal some criminal activity or because he is irrational. It certainly goes beyond the mere implication that he likes privacy, as argued by the petitioners.

Eringer was the sole source of this allegation.

(6) Carto supported G. Gordon Liddy's congressional campaign in New York.

When the petitioner's article was published, Mr. Liddy's reputation had been harmed by his conviction of a felony. The sole source of the false and damaging allegation was Eringer.

(7) Carto secretly observes employees through a one-way mirror.

This false allegation is an invention attributed exclusively to Eringer.

(8) Illustration of Carto secretly observing employees through a one-way mirror.

The petitioners sought to heighten the impact of the false allegation made exclusively by Eringer and did so by publishing a drawing of a Hitler-like Carto peering through a one-way mirror to observe prospective employees.

(9) Claim that a lead story in The SPOTLIGHT was a total hoax.

Eringer was the sole source of this false allegation. No other sources bolster these allegations of deliberate journalistic deception.

Each separate act of defamation set forth above is an in-

dependent and false allegation made with reckless disregard for the truth or with knowledge that the assertion was untrue. Thus each act of defamation would have met the heightened standard of clear and convincing evidence had the Court of Appeals improperly utilized such a measure.

The evidence adduced by the respondents in resistance to petitioners' motion for summary judgment is far weightier than that slight imbalance of scales required by the "preponderance of the evidence" standard of proof. The ultimate factual question, the constitutional question, must therefore be answered in respondents' favor: They have met their burden of showing by clear and convincing evidence that the petitioners published defamatory statements about them with actual malice.

CONCLUSION

In eighteenth century England the rule was well established in criminal cases, and not always confined to criminal cases, that "the greater the truth the greater the libel." Lord Mansfield was credited with the maxim and his authorship of the doctrine was celebrated by Robert Burns in "The Reproof":

> Dost not know that old Mansfield
> Who writes like the Bible,
> Says the more 'tis a truth, sir,
> The more 'tis a libel?

Andrew Hamilton in the landmark *Zenger* case in 1735 challenged that concept as Alexander Hamilton did for the defense in *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804).

While truth was held to be no defense to a charge of libel in the Court of the Star Chamber in 1605, two centuries later in New York State that concept was by and large abandoned. Hamilton's argument that the truth be essential in determining libel was so powerful that his call for the privilege "to publish the truth," widely reprinted in the Colonies and England, was

one of the factors which led to the First Amendment provisions concerning freedom of speech and freedom of the press.

In the instant matter in the name of the First Amendment the petitioners seek the right to publish falsehoods with almost absolute immunity from responsibility, and in that plea they are joined by other representatives of the news media. They urge that the First Amendment be distorted to afford to them this extraordinary protection. Yet they would deny to those among us who would speak in non-conforming tones the right to do so except at the peril of the destruction of reputaton through defamation which may not be redressed through our legal system. They would deny as well the right guaranteed by the Seventh Amendment to a trial by jury. They assert that a proliferation of defamation cases successfully concluded by plaintiffs through the utilization of our jury system may best be halted by the establishment of procedural as well as substantive obstacles to be fashioned by the Court.

Perhaps a more moderate approach and one more in keeping with our traditional concepts of law would be to urge those in the business of selling newspapers, magazines and air time to take more care in the preparation of their stories so that they cease publishing false and defamatory remarks. After all very few would urge that growing problems of increasing criminal conduct be met by the repeal of all penal statutes.

In this matter the Court of Appeals correctly concluded that the standard for evaluating a limited purpose public figure libel case does not require that upon a motion for summary judgment the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with "convincing clarity."

The Court correctly resisted the effort to impose increased proof requirement at that stage for it would change the threshold summary judgment inquiry from a search for minimum of facts supporting the plaintiff's case to an evalua-

tion of the weight of those facts. Particularly is that so when the state of mind of central witnesses may best be discerned by the trier of the facts who is given the opportunity to assess the credibility of the witness through the witness demeanor during testimony.

For the reasons described above, we respectfully request that the order of the Court of Appeals be affirmed.

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